

ENTERED

MAR 19 2007

K.R.W.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
MAR 19 2007
United States Bankruptcy Court
Columbia, South Carolina (5)

IN RE:	C/A No. 06-06088-HB
Kathy Marie Talley,	Chapter 13
Debtor.	ORDER

THIS MATTER comes before the Court for hearing on confirmation of the Debtor's chapter 13 plan. The chapter 13 trustee objected to confirmation as did creditor David Eller. The Debtor was present at the hearing and testified in support of confirmation. Also present at the hearing were David C. Alford, attorney for the Debtor, the chapter 13 trustee Gretchen D. Holland, and William McMaster and Gina McMaster, attorneys for Mr. Eller.

FACTS

The Debtor filed for bankruptcy relief under Chapter 13 on December 30, 2006. At the time she filed for bankruptcy protection she was delinquent on her mortgage payments to Mr. Eller. Mr. Eller also holds a judgment against the Debtor. The Debtor proposed a plan (Amended Chapter 13 plan filed March 4, 2007) that pays the mortgage arrearage over time and requires her to resume her regular payments to Mr. Eller. The plan also proposed to avoid the judgment lien of Mr. Eller as it impairs her homestead exemption. The plan requires a payment to the chapter 13 trustee to fund the plan in the amount of \$80 per month for a period of three months, and \$335 thereafter for a period of thirty-three months. The chapter 13 trustee and Mr. Eller objected to confirmation of the plan based on feasibility grounds, arguing that the Debtor did not have sufficient

disposable income to fund the plan, that her income is questionable and unstable, and her expenses are grossly understated.

The Debtor filed schedules and statements in this case under oath, including Schedules I and J setting forth her household budget. Initially, the schedules filed on December 30, 2006, listed average monthly income of \$880 itemized as \$430 per month from babysitting, \$150 designated as "Other monthly income" from Nathan Talley and \$300 from Clara Ruth Talley. The Debtor's Schedule I stated that she did not anticipate any change in income. The Debtor's Schedule J listed monthly expenses of \$785 for a household consisting regularly of the Debtor and her three children ages 10, 12 and 17.

After Mr. Eller objected to confirmation of the plan based on feasibility, the Debtor amended her Schedule I on March 4, 2007 to reflect average monthly income of \$1098 consisting of \$518 in food stamps, \$430 in income from babysitting and \$150 from Nathan Talley. The Debtor testified that Nathan Talley was her brother and that he stayed at her home occasionally and this is why he paid her about \$150 per month. The \$300 entry for Clara Ruth Talley was removed in the amended Schedule I. The Debtor attached to the amendment a letter from authorities indicating that she applied for food stamps on February 22, 2007, and should receive \$518 per month based on that application beginning in March. The Debtor's budget listed only \$200 for food despite food stamps to be received in the amount of \$518 per month. The Debtor listed no expenses for items such as clothing, laundry, medical, dental, and recreation. The \$785 in average monthly expenses itemized per person, after deducting the \$223 home mortgage payment, would leave approximately \$140 per person per month (less than \$5 per day) for all other household and personal expenses. When questioned about the low expenses,

the Debtor explained that her children did not need clothes because they already had them or their fathers provided them,¹ that they did their laundry elsewhere at the expense of others and that when they got sick they went to the emergency room, all resulting in no expense to the Debtor.² She testified that she and her children regularly ate with family members and that her children received two free meals at school each day, which lowered her food expense. She also testified that her car was broken down, but that someone in her family would take care of fixing it and that she and her children got rides with others as needed.

Although not yet disclosed in any schedules or statements, the Debtor testified at the hearing on March 8, 2007, that she had a new job at Pizza Hut which would allow her to earn gross pay of \$2.50 per hour plus tips. The Debtor did not provide any documentation or other proof of the certainty or possible longevity of this new job and the amount of the new income was merely estimated. This income would be in addition to that stated on her Schedule I, unless some adjustment to public assistance is made as a result of the additional income.

DISCUSSION AND CONCLUSIONS OF LAW

11 U.S.C. § 1325(a) sets out certain elements which must be met to confirm a chapter 13 plan. Section 1325(a)(6) provides, as one of these requirements for confirmation, that a debtor must demonstrate the ability to make all payments and otherwise comply with the plan before the plan can be confirmed. In re Williams, No. 97-08824-JW, 1998 WL 2016786, at *2 (Bankr. D.S.C. Jan. 13, 1998). In addition, § 109(e)

¹ The Debtor's budget does not disclose any parental maintenance or support, voluntary or otherwise.

² It should be noted, however, that within the meager budget, the Debtor included a line item of \$136 per month for phone service, approximately 17% of the total budget.

restricts chapter 13 relief to “individual[s] with regular income.” 11 U.S.C. § 109(e)(West 2006); In re Etheridge, No. 06-04190-JW, slip op. at 2 (Bankr. D.S.C. Dec. 27, 2006).

Section 101(30) defines an “individual with regular income” as one “whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13.” 11 U.S.C. § 101(30); In re Etheridge, slip op. at 2-3.

Courts have held that where a debtor does not have sufficient income to pay his reasonable expenses and the proposed plan payment, the plan is not feasible as required by 11 U.S.C. § 1325(a)(6), and confirmation must be denied.

In re Williams, at *2 (quoting In re Smith, No. 91-03821-WB (Bankr. D.S.C. Oct. 9, 1991)). The debtor has the burden of proving that the plan is feasible. Id. at *2.

As to feasibility under § 1325(a)(6), this Court has repeatedly held that “feasibility cannot be satisfied by gratuitous or volunteered contributions by nondebtor third parties.” In re Etheridge, slip op. at 2. Rather, third-party contributions “may be considered where there is evidence demonstrating that the contributing third-party is legally obligated to make certain contributions to debtors or there is evidence of regular reliable contributions in the past.” In re Bigby, No. 05-45006-JW, slip op. at 3-4 (Bankr. D.S.C. Dec. 7, 2005).

Except for the babysitting income, all aspects of Debtor’s income are problematic in some regard, whether as to reliability, certainty, longevity or gratuitousness. With regard to the \$150 monthly “rent” from Nathan Talley, the Debtor provided no documentation of an enforceable agreement or proof of regular past payments. The alleged living/payment arrangement appears to be casual and non-binding. The fact that the \$300 monthly contribution from Debtor’s mother, which Debtor testified was also “rent,” was on her original Schedule I, but not on her amended schedule speaks to the

gratuitousness and uncertainty of these contributions from her family members and also raises questions regarding the Debtor's credibility on this subject.

Regarding the Debtor's potential income from her new job, at the time of her testimony, she had not yet reported for work and did not provide sufficient evidence to substantiate her claim of a new job, her chances of retaining the employment nor the amount of pay that she will receive. The Debtor also has not amended her schedules to include this projected income. Therefore, the Debtor has failed to meet her burden of proof as she is unable to demonstrate sufficient regular and stable income to fund her plan and pay her scheduled projected expenses. Even if the Court were to find that the Debtor had sufficient income to fund the plan and pay the \$785 in estimated expenses,³ those expenses are grossly insufficient to meet the needs of the Debtor and her family over the next thirty-six months. Even if the Debtor could live on such an understated budget for a short period of time, doing so for a number of years appears impossible. The budget is simply so meager that it is inaccurate.

As the Debtor has failed to meet her burden of proof under § 1325(a)(6), the plan is not feasible and confirmation is hereby denied.

For the foregoing reasons, it is hereby

ORDERED that the objections of David Eller and the chapter 13 trustee to confirmation of the Debtor's chapter 13 plan are sustained, and confirmation is denied as

³ The IRS National Standards of Allowable Living Expenses allow a standard deduction on an above-median debtor's form B22 of \$890 per month for a four-person household with a gross monthly income of between \$833 and \$1,249 for a combination of food, housekeeping supplies, apparel and services, personal care products and services and miscellaneous expenses. The IRS-recommended expense for just these few categories, which do not include medical, transportation, housing or other expenses, exceeds this household's entire proposed budget figure.

the Debtor failed to meet her burden of proving that the plan complies with 11 U.S.C.

§ 1325(a)(6).

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Spartanburg, South Carolina
March 19, 2007